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[*Seal v. The American Inspection Co.*, 92-ERA-6 \(ALJ May 28, 1993\)](#)
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U.S. Department of Labor
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DATE: MAY 28 1993

CASE NO: 92-ERA-6

In the Matter of

DARRYL SEAL
Complainant

v.

THE AMERICAN INSPECTION CO.
Respondent

Alison J. Quin, Esq.
For the Complainant

Fred R. Kimmel, Esq.
For the Respondent

Mark E. Davis, Esq.
For the Respondent

Richard D. Mills
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA) as amended, 42 U.S.C. §5851 (1982).

Complainant was rehired by Respondent, the American Inspection Company (AMSPEC) and worked as a Level Two Radiography Technician at the Hess Oil Refinery, St. Croix, Virgin Islands (HOVIC), a client of AMSPEC, from March, 1991

until he was terminated on July 26, 1991. Thereafter, Complainant filed an ERA complaint that was dated August 25, 1991 with the U.S. Department of Labor (DOL) against HOVIC alleging wrongful discharge. A hearing was conducted in Memphis, Tennessee on January 5, 1993 at which time the parties were represented by counsel and afforded the opportunity to present documentary evidence, examine and cross-examine witnesses, and make oral arguments. Five Administrative Law Judge exhibits, 32 Joint exhibits, 6 Complainant's exhibits, and 2 Respondent's exhibits were admitted into evidence at the hearing.¹

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Stipulations

Prior to the hearing and at the hearing, the parties stipulated to the following:

1. AMSPEC is subject to the provisions of the energy Reorganization Act, 42 U.S.C. §5801, et seq.
2. Darryl Seal was certified by AMSPEC as a Level II Technician in Radiography.
3. Mr. Seal was initially hired by AMSPEC in 1989. He worked as a Level II Radiographer at an AMSPEC project in Puerto Rico from May, 1989 - August, 1989.
4. Mr. Seal's work for AMSPEC in Puerto Rico was satisfactory. He left AMSPEC's employ in August, 1989, because the project he was hired to work on ended.
5. Mr. Seal was rehired by AMSPEC as a Level II Technician on March 12, 1991.
6. Rate of pay for Darryl Seal was \$12.50 per hour with time and a half for work over 40 hours per week.
7. Mr. Seal worked for AMSPEC from March 12, 1991 through July 26, 1991 at the Hess Oil Refinery, St. Croix, Virgin Islands, as a Level II Technician -- Radiography.
8. Darryl Seal's employment with AMSPEC was terminated on July 26, 1991.
9. The letter in evidence [in Morris 92-ERA-5] identified as AX number 4 is authentic.
10. Mitchell Matrous committed three safety violations.
11. The other technicians working that evening included Mr. Terry Takahashi, Mr. Jerry Nordin, Mr. Tom Abbott, Mr. Olaf Olsen, Mr. Michael Morris, Mr. John Day, Mr. Wesley Dick, Mr. Ed Scribner, and Mr. Chris Ladner.
12. After learning that they would not be needed until 7:30 p.m., Complainant, along with Mr. Terry Takahashi, Mr. Jerry Nordin, Mr. Tom Abbott, Mr. Olaf Olsen, Mr.

Michael Morris, Mr. John Day and Mr. Wesley Dick decided to leave the office to make a grievance list at an outdoor lunch site. 13. The grievance was written by Mr. Dick with input from the others.

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14. Mr. Morris attested that the meeting to write the grievance list lasted about half an hour.

15. According to Complainant, Mr. Oliver arrived at the office at approximately 7:25 p.m. and immediately asked the eight technicians what they had been doing, to which they responded that they had a lot of grievances.

16. Mr. Morris testified that Mr. Oliver replied that any complaints should be addressed to Ms. Lezlie McCool and told them to "hit the gate."

17. After realizing" that they had been terminated, Complainant and the other seven technicians turned in their equipment for which they received receipts and left the facility.

18. Mr. Morris testified that when Mr. Oliver terminated their employment, he had not looked at the grievance list.

19. Mr. Morris acknowledged that he received a memo before his termination informing him that AMSPEC employees were only allowed to enter or leave through certain gates and that any employee found violating this rule would be given one warning before being terminated.

20. On July 26, 1991, Mr. Larry Ladner was the acting supervisor for the night and the Radiation Safety Officer.

21. Mr. Larry Ladner testified that when Complainant and the other seven technicians walked into the office they asked to speak with Mr. Oliver in person.

22. After this communication with them, Mr. Larry Ladner did not know what transpired between the technicians and Mr. Oliver, except that they checked in all their equipment and issued receipts after they were terminated.

23. On the evening of July 26, 1991, Mr. Oliver was operations manager in St. Croix, Virgin Islands.

24. After Mr. Larry Ladner went back out into the plant to search for Complainant and the other technicians, Mr. Oliver received another call from Mr. Larry Ladner.

25. While still speaking to Mr. Larry Ladner on the phone, Mr. Oliver testified that the men appeared at the office and wanted to speak to him in person.

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26. When Mr. Oliver arrived at the office approximately ten minutes later, Mr. Oliver testified that Mr. Dick attempted to hand him several papers, but that Mr. Oliver cut the conversation short to find out where the eight technicians had been.

27. Upon hearing this, Mr. Oliver told them to "hit the gate" without reading the grievance.

28. Though Mr. Oliver stated that he did not care what was listed in the grievance list, he admitted that he received a copy of the list two days later and that one item on the list related to safety.

Issues

The unresolved issues in this case are whether or not AMSPEC terminated Complainant in violation of the anti-retaliatory provision contained in the ERA.

Findings of Fact

Complainant, a certified level II technician in radiography, was rehired by AMSPEC to work on a project inspecting pipe for HOVIC in St. Croix, Virgin Islands.

Before Complainant left his home for St Croix, AMSPEC mailed him a packet of documents including an application, an employment agreement, an agreement concerning payment for housekeeping Services, a receipt for an Operating and Emergency Procedures Manual and a blank receipt for radiography equipment. He was instructed to sign and return the receipt for a manual and that he would be issued a manual upon his arrival in St. Croix.

He arrived in St. Croix on March 12, 1991, and two days later was issued equipment, including a film badge and a dosimeter. He did not receive an Operations and Emergency Procedures Manual or a rate alarm² as required by Nuclear Regulatory Commission (NRC) regulations. Mr. Seal complained to his immediate supervisor, Craig Hancock and to AMSPEC'S radiation safety officer, Larry Ladner, about AMSPEC'S failure to provide him with these essential items. He was finally issued a rate alarm about a month and a half after his arrival, but he never received an Operations and Emergency Procedures Manual.

I find it uncontroverted that Complainant objected to his supervisors about working with technician Mitchell Matrious because of Mr. Matrious' numerous safety violations.

Mr. Seal testified that he was told that he was "stuck with him." (Tr. 28). On June 11, 1991 Mitchell

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Matrious was fired by Employer because of three safety violations.

Complainant also alleged that Mr. Ladner requested that he sign statements that he had attended radiation safety meetings which were not held. He refused to sign said statements (Tr. 3233).

In May 1991, Complainant, along with several other technicians, including Mrs. Ladner and Matrious, Michael Morris³, and Tom Abbott, saw his supervisor, Craig Hancock, using a radioactive isotope to x-ray a mouse. Complainant measured the radiation which he testified was far in excess of permissible safety levels (Tr. 46-48). Later in July, the Nuclear Regulatory Commission (NRC) sent an inspector to St. Croix to investigate safety violations. Complainant testified that he confronted Craig Hancock as to whether the inspector has asked about the mouse incident and Hancock replied that Larry Ladner had denied to the inspector that the incident had occurred. Complainant said he told Mr. Hancock that "if I see these investigators and they ask me about it, I'm going to tell them exactly what I saw, as far as [you] being the one who was x-raying this mouse." Mr. Hancock replied that "Well, I wouldn't do that." (Tr. 49).

Steve Oliver testified that the NRC inspector questioned him about this incident when he was in St. Croix on July 22nd and 23rd, but he stated that he could not recall what he knew about the incident at the time (Tr. 120-122).

Three days after the NRC inspection, on July 26, 1991, Mr. Seal was terminated along with technicians Michael Morris, Terry Takahashi, Jerry Nordin, Tom Abbott, Olaf Olsen, John Day and Wesley Dick (J.S. 8, 12, 15, 16, 17). That evening, Mr. Seal and the other members of the night shift clocked in 10 minutes before 6:00 p.m., when the night shift started and checked the board to find out what location they would be working in and then loaded all their equipment into the truck (Tr. 51-52). Mr. Seal and his partner, Terry Takahashi, went to the assigned unit ("Six Crude") to obtain a work permit for the crew to enter the unit and start work. Mr. Takahashi was told that the crew could not gain access to the unit for approximately two hours because two other groups of contractors were working in the area (Tr. 52).

Inability to gain access to a unit because of the presence of other contractors was a fairly common occurrence (Tr. 61, 110). On such occasions, employees would either wait in AMSPEC's office until they could get into the unit or they would leave the office of various purposes such as washing or filling up their trucks or using the restroom at the

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firehouse (Tr. 62, 111).

In any case, after Takahashi learned that the crew could not obtain a work permit to get into Six Crude, he complained to Larry Ladner about the failure to organize the job beforehand making it difficult to meet production goals (Tr. 53). He suggested to the other technicians that they sit down and discuss all the problems they were having and draw up a list of grievances (Tr. 53-54; J.S. 12).

Mr. Seal, Mr. Takahashi, Mr. Day, Mr. Abbott, Mr. Nordin, Mr. Morris, Mr. Dick and Mr. Olsen then went to a Location on HOVIC property that has variously been described as a break area, an outdoor lunch site and a laydown yard (Tr. 54, R-2 at 176, J.S. 12). Steve Oliver testified that this was an unauthorized area, but Mr. Seal stated that the area had picnic tables and a restroom and was lighted.

Complainant testified that he had been to the area one or two times with Mr. Takahashi and had never been told by him or anyone else that it was off limits. He saw no sign indicating the area was off limits (Tr. 63).

The eight technicians drew up a list of the various problems they were having with AMSPEC (J.S. 14, Tr. 54, JX-2). There were eleven items on the 5-page written grievance, the first ten having nothing to do with radiation or safety. Complainant stated that he and Mike Morris in particular, voiced concern about safety violations but that all the technicians voiced complaints about being required to sign statements of attendance at safety meetings that never took place. Mr. Wesley Dick wrote down the grievances, which included as grievance number 11, "Red. Safety Meetings" (JX-2, page 1). Complainant did not sign the list because it omitted some of his safety concerns and included some grievances that he felt were less important (Tr. 56, 91).

The technicians then returned to AMSPEC's office at approximately 7:10 p.m. and told Larry Ladner that they wanted to speak to Steve Oliver. According to Mr. Oliver, Mr. Ladner had already called him to report that he did not know where the technicians were. Mr. Ladner called Steve Oliver when the technicians returned and Mr. Oliver agreed to come in. When Mr. Oliver arrived at the office, Wesley Dick handed him the grievance list along with a cover sheet summarizing the complaints (prepared while the technicians awaited Mr. Oliver's arrival). Mr. Oliver glanced at the list and then asked the technicians where they had been. When they replied that they had been drawing up the list of grievances at the laydown yard, he told them all to "hit the gate." (RX-2 at 176). When Takahashi told him they had not been able to get into their work area because other contractors were there, he

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responded "I don't care; everybody hit the gate." At that point, the technicians, including Mr. Seal, turned in their equipment and left the refinery (Tr. 61).

Mr. Oliver testified that on the date he terminated the employees, he did not care what was listed on the grievance and he admitted that he received a copy of the list two days later and knew that the one item (number 12) related to safety (RX-2 at 196197). In the Michael Morris hearing, Mr. Oliver testified that he had the power to hire and fire employees on July 26, 1991 and that the following morning Ms. Lezlie McCool, a vice-president with AMSPEC, agreed with Mr. Oliver's decision. In explaining why he decided to terminate Mr. Morris and the other employees, Mr. Oliver stated that generally HOVIC would ask AMSPEC to terminate an employee if the employee was caught in an area in which he did not belong, a practice that had been used in the past (RX-2 at 176).

Mr. Oliver stated that AMSPEC maintains daily progress reports at the request of HOVIC that break down what area the employee worked in and what problems were encountered. Based on past experience, Mr. Oliver believed that AMSPEC's contract with HOVIC would have been in jeopardy if these eight technicians had reported that they had been in this area making a grievance list (RX-2 at 190-191). Mr. Oliver testified that two previous employees of AMSPEC, David Gould and Richard Sylvester, were terminated because they were in an unauthorized area and because the guard thought they were sleeping (RX-2 at 191-192).

At the hearing on the *instant* claim of Mr. Seal, Mr. Oliver testified that there were no written policy memos from HOVIC about unauthorized areas of the refinery (TR-101).

Mr. Oliver stated he didn't think it necessary to give progressive discipline in this instance since he believed the actions of the employees to be "insubordination" (Tr. 116 & 117). He then went on to state that "The technicians were fired for not being at their work station." (Tr. 117).

Discussion

A prima facie case is made out by an employee alleging retaliatory discharge under the whistle-blower provision by showing (1) that the employee engaged in conduct protected by the Act; (2) that the employer was aware of the conduct and took some adverse action against the employee; and (3) that the inference is raised that the protected activity was the likely reason for the adverse action. See,

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Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec. Order, April 25, 1983 (Darty), slip op. at 7-8; accord, D'Agostino v. B&O Distribution Service, Inc., Case No. 88-STA-11, Sec. Order, May 10, 1989, slip op. at 4. See also, Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984).

In this case, Complainant contends that he made many internal complaints about safety violations to his supervisors. First, he complained to Hancock and Ladner about AMSPEC's failure to provide him with the operations manual. Complainant also refused

Ladner's request that he sign statements verifying attendance at nonexistent safety meetings. Mr. Oliver did admit on cross-examination that there was nothing new on the grievances (which included number 11, safety items) that he hadn't already discussed with all of these people (RX-2 at 183).

Finally, Mr. Seal protested to his supervisor, Hancock, the improper use of the radioactive isotope to x-ray a mouse. Moreover, Complainant warned Hancock that he would tell the NRC inspector the truth about the incident if asked, and Hancock replied, "I wouldn't do that." (Tr. 49). Mr. Oliver admitted that the NRC inspector asked him about the mouse incident (Tr. 120-122). He further admitted that he had heard about the x-ray of a mouse but that no one would tell him who did it. He also testified that he had talked to the night shift employees about this incident (Tr. 121).

I agree with Complainant's argument that although there is not direct evidence that Oliver was aware of Mr. Seal's conversation with Hancock, the timing of Seal's discharge, only three days after the event, makes it more than likely. However, I find that there is no proof that Mr. Oliver knew that the grievance list contained safety complaints since he merely glanced at it and immediately fired the employees with the admonition "Hit the gate."

Nevertheless, I find the x-ray of the mouse incident, the NRC inspection and the timing of the discharge sufficient evidence to prove a prima facie case.

The crucial element in proving Claimant's prima facie case, including proof of Employer's retaliatory nature is the timing of these events. Mr. Seal had warned Ladner that he would tell NRC the truth about the mouse incident. On July 22-23, the NRC made their inspection and three days later Complainant was fired.

Once Complainant has established a prima facie case, the burden shifts to Respondent to articulate legitimate, nondiscriminatory reasons for the adverse action.

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Respondent contends, and I agree that Complainant was treated no differently than all the other seven employees who were fired on the night in question. I find that Mr. Oliver did not know that the grievance contained a safety related complaint. Of greater import, Mr. Oliver fired all the technicians at the same time. It is inconceivable to the undersigned that in order to fire Mr. Seal for a retaliatory motive that he would also fire the other technicians. Many of these technicians had not expressed concerns about safety measures (RX-2 at 103). I find that Mr. Oliver fired all of the technicians for the same reason, namely, that they, in acting in mass, were insubordinate and had left their work areas without permission, were in an unauthorized area and could not be found by their supervisor. I thus find Respondent has successfully rebutted Claimant's prima facie case, since it has proven that the reason for firing Mr. Seal had nothing to do with his protected activities.

For the above reasons I recommend that this complaint be dismissed.

RICHARD D. MILLS
Administrative Law Judge

Dated:
Metairie, LA

RDM/pyc

[ENDNOTES]

¹Throughout this decision, Complainant's exhibits, Respondent's exhibits, Joint exhibits, Administrative Law Judge exhibits, and the Transcript will be referred to as "CX", "RX", "JX", "ALJX", and "Tr." respectively.

²A rate alarm is a precautionary device that alerts people to the fact that they are being exposed to a high amount of radiation (Tr. 20-21).

³Mr. Morris also filed a Department of Labor complaint.